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CASES CITED.

STATUTE AND REGULATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

WALDEMAR GNERICH AND JEREMIAH T. Regan, copartners, doing business under the firm name and style of B. & S. Drug Company, appellants,
v.
S. F. RUTTER, AS PROHIBITION DIRECTOR in and for the District of California.
No. 79.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE APPELLEE.

STATEMENT.

This appeal brings before the court a decree of the Circuit Court of Appeals for the Ninth Circuit entered in a suit filed by appellants in the District Court for the Northern District of California against the Acting Federal Prohibition Director in and for that District to restrain him from enforcing the provisions of a permit restricting the amount of intoxicating liquors appellants might use and sell for nonbeverage purposes during any quarterly period.

Appellants are pharmacists regularly engaged in the practice of their profession of compounding medicinal preparations on physicians' prescriptions and dispensing and selling various medicinal preparations at retail. In conformity with the provisions of the National Prohibition Act and the regulations published by the Secretary of the Treasury and the Commissioner of Internal Revenue under authority thereof, appellants and all other pharmacists using alcohol and other intoxicating liquors in their business were required to apply for and receive from the Bureau of Internal Revenue a permit to compound and dispense medicinal preparations containing such liquors. Appellants forwarded to the Commissioner of Internal Revenue their application on the prescribed form and recited therein that the probable quantity of alcohol and other intoxicating liquors necessary to their business needs or required to be on hand or used by them during any quarterly period would be 283 proof gallons of alcohol, 157 proof gallons of whisky, and 5 gallons of wine. (R. 12–13.) The application was accompanied by an appropriate bond as required by the regulations. The bond and application were approved and in due course a permit was issued by the Federal Prohibition Commissioner with the restriction or limitation, however, that "This permit is issued for 100 gallons of distilled spirits and 5 gallons of wine per quarterly period." (R. 14–15.)

Upon receipt of the permit appellants from time to time made application to the local Prohibition Direc-

tor, under Sections 54 and 55 of the regulations, for permission to purchase alcohol and other distilled spirits. On March 2, 1921, in response to an application for permission to purchase one barrel of grain alcohol, appellants received from the then Prohibition Director a notice that the application was denied for the reason that appellants had already withdrawn for the current quarter a total of 90 gallons and that a permit to purchase a barrel of alcohol would enable appellants to withdraw and use in excess of 100 gallons for the current quarter. (R. 16.) Alleging that the 100 gallons limitation inserted in the permit by the Federal Prohibition Commissioner "is arbitrary, unlawful, unreasonable, and void as constituting an unwarranted usurpation of legislative powers by an administrative officer of the executive department of the Government, and is an attempt by said official to invalidate and repeal those portions of the National Prohibition Act which recognize and permit the lawful use of intoxicating liquor for medicinal and nonbeverage purposes," appellants brought this bill, as above stated, to restrain and enjoin the local Prohibition Director from enforcing as against them such or any restriction upon the amount of spirituous liquors that might be lawfully dispensed by them. (R. 1–11.)

On motion of the defendant the bill was dismissed by the District Court upon the ground that it did not state facts sufficient to constitute a cause of action against the defendant as Acting Prohibition Director in and for the District of California. (R.

20.) On appeal the decree was affirmed by the Circuit Court of Appeals upon the grounds, first, that the Commissioner of Internal Revenue was not made a party to the suit, and, secondly, that the defendant Acting Prohibition Director ceased to be such during its pendency. (R. 51, 53.) A petition for rehearing was denied. (R. 54.)

STATUTE AND REGULATIONS INVOLVED.

The Eighteenth Amendment imposes no prohibition upon the manufacture, sale, or transportation of intoxicating liquor for nonbeverage purposes, nor does it define what shall constitute intoxicating liquor, but Congress in the National Prohibition Act defined the latter and also enacted numerous stringent provisions for giving effect to the Constitutional Amendment and for preventing its evasion. The applicable provisions of the Act and the regulations established pursuant thereto, so far as material here, will be found in an appendix to this brief.

QUESTIONS PRESENTED.

The questions presented are—

(1) Was the Commissioner of Internal Revenue a necessary and indispensable party to the suit?

(2) Did the Federal Prohibition Commissioner have the power to place a restriction or limitation in the permit and prohibit the use by appellants of distilled spirits beyond that limit, and, if not, can appellants restrain appellee from enforcing the same?

(3) Has Congress the power, under the Eighteenth Amendment, to restrict or prohibit the use of spirituous liquors for admittedly nonbeverage purposes?

ARGUMENT.

I.

The Commissioner of Internal Revenue was a necessary and indispensable party to the suit.

The authority for the offices of Federal Prohibition Director and Federal Prohibition Commissioner is derived from Subdivision 7, Section 1 of Title II, of the National Prohibition Act, which provides that any act authorized to be done by the Commissioner of Internal Revenue may be performed by any assistant or agent designated by him for that purpose. Further authority for the office appears in Section 38, which declares that the Commissioner of Internal Revenue and the Attorney General respectively are authorized to appoint and employ such assistants, experts, clerks and other employees, including such executive officers as may be appointed by them to have immediate direction of the enforcement of the provisions of the Act. The regulations issued under the Act define the Director or Federal Prohibition Director as the person having charge of the administration of Federal prohibition in any State (Section 1, Subdivision *e*), and they specify in various places the duties and powers of a Director. Article III of the regulations, while directing that applications under Form 1404 be filed with the Director who is to forward his recommendations thereon to the Commissioner, states that it is solely the Commissioner who issues the permit. The permit, limited as the law authorizes it to be limited, binds all subordinates of the Commissioner, as well as any permittee or other

person. The Director has nothing to do with the issuance of the permit. His sole duty, power or authority is to forward the application with his recommendations.

The regulations (Section 54) further prescribe the procedure to be adopted to secure permits to purchase by persons who have previously made application and received a permit from the Commissioner under the procedure outlined in Article III. These permits are sometimes called "withdrawals." The applications therefor are made on forms known as "1410," and these applications are required to show, among other things, "the number of the permit held by the applicant and the address covered thereby." (Section 55.) And it is further provided in Subdivision (h) of that section, referring to applications on Form 1410, "No application for permits to purchase should be approved by the Director until same has been carefully checked by him with such files and the amounts thereon found to correspond with those *indicated on the previous permit to purchase issued to the applicant.*" This last reference is to the permit previously issued to the applicant by the Commissioner under Article III, on his application 1404, the permit being on Form 1405. Accordingly, by the very regulations which are by statute made a part of the Act, the powers of the Director are expressly limited and prescribed and the withdrawals he is authorized to issue necessarily rest upon unexpired permits previously issued by the Commissioner. The Director would have no power to issue any permit of

any kind under 1410 or any other provision of the law unless it were authorized to be issued by the terms of the previous permit issued by the Commissioner under Article III.

Thus the Director is a mere agent or subordinate of the Commissioner and has no power except such as he derives from the latter, and in the exercise of his power he is expressly limited by the act of the Commissioner himself in issuing the original permit. And if a court of equity should require him to ignore the limits or conditions of his own authority, it would not be a case where he would have a plain statutory duty to perform, and hence a court of equity would not coerce him in the exercise thereof.

The situation with reference to the Director being a mere subordinate of the Commissioner with a limited power is analogous to that of a ministerial officer acting in obedience to process or orders issued by tribunals or officers invested by law with authority to pass upon facts and make an order thereon. That the subordinate in such case would have no jurisdiction or discretion to depart from the direction of a superior is well settled.

Erskine v. *Hohnbach*, 81 U. S. 613;
Haffin v. *Mason*, 82 U. S. 671;
Harding v. *Woodcock*, 137 U. S. 43.

The case first above cited was an action for damages against a collector of internal revenue for the alleged wrongful seizure of certain property in the enforcement of an assessment against the plaintiff made by the assessor of the district and certified to the collector

with an order directing its collection. In affirming a judgment for the collector this court said (pp. 616–617):

> The collector could not revise nor refuse to enforce the assessment regularly made by the assessor in the exercise of the latter's jurisdiction. The duties of the collector in the enforcement of the tax assessed were purely ministerial. The assessment, duly certified to him, was his authority to proceed, and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject matter, constituted his protection.
>
> Whatever may have been the conflict at one time, in the adjudged cases, as to the extent of protection afforded to ministerial officers acting in obedience to process, or *orders* issued to them by tribunals or *officers* invested by law with authority to pass upon and determine *particular facts*, and render judgment thereon, it is well settled now, that if the officer or tribunal possess jurisdiction over the subject matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the *order* or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been com-

> mitted by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued. (Italics ours.)

The rule that an action of this character does not lie against a subordinate officer when the principal officer is not joined is well exemplified in the case of *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28. In that case a bill was filed seeking a mandatory injunction against the Secretary of the Interior and the Commissioner of the General Land Office. A demurrer to the bill was sustained and a decree rendered for the defendant, which was affirmed by the Court of Appeals for the District of Columbia, and an appeal taken to this court. Pending the appeal the Secretary resigned his office. Thereupon this court reasoned that owing to the character of the action he had ceased to be a party and his successor could not properly be substituted, thus leaving the action against the Commissioner alone. With that situation in mind, this court said (pp. 34–35):

> The purpose of the bill was to control the action of the Secretary of the Interior; the principal relief sought was against him; and the relief asked against the Commissioner of the General Land Office was only incidental, and by way of restraining him from executing the orders of his official head. To maintain such a bill against the subordinate officer alone, without joining his superior, whose acts are alleged to have been unlawful, would be contrary to settled rules of equity pleading. Calvert on Parties (2d ed.), bk. 3, c. 13.

> This is well exemplified by a decision of Lord Chancellor Hardwicke. Under acts of Parliament, appointing commissioners to build fifty new churches, appropriating money to support the ministers, and providing that the moneys appropriated should be paid to a treasurer, not one of the commissioners, but appointed by the Crown, and should be by him disbursed and applied according to orders of the commissioners, Lord Hardwicke held that a bill by a minister of one of the churches to recover his stipend, and to have a fund in the treasurer's hands invested as required by the acts, could not be maintained against the treasurer alone, without joining any of the commissioners; and said: "This is one of tne most extraordinary bills I ever remember; and there is no foundation for relief, either in law or equity. It is brought against Mr. Blackerby, who is nothing but an officer under the commissioners for building the fifty new churches. It would be absurd if a bill should lie against a person who is only an officer and subordinate to others, and has no directory power." "I should think the commissioners only, and not the treasurer, ought to have been parties, for it is absurd to make a person who acts ministerially the sole party." *Vernon* v. *Blackerby*, 2 Atk. 144, 146; S. C., Barnardiston Ch. 377.

The point is made in the opinion (p. 33) that the Commissioner was to perform executive duties *under the direction of* the Secretary. Other like provisions of law were referred to, wherefore it was considered

that the Commissioner was a mere subordinate of the Secretary.

We have here a much stronger case for the application of the same doctrine. Under the provisions of Subdivision 7, Section 1, and Section 38, Title II, of the National Prohibition Act, the Director's office is a mere creation of the Commissioner of Internal Revenue and the duties the former is directed to perform render him entirely subordinate to the latter.

It is clear that appellants sought to secure all the benefits of an equitable review of the action of the Commissioner without bringing a suit against the Commissioner, but have sought instead to sue a subordinate agent having no discretion in the premises, and a decree against whom would in no respect bind the Commissioner. Such a decree would be futile and would afford appellants no immunity for their violations of the Commissioner's permit.

If appellants felt aggrieved by the action of the Commissioner they had a right of review in a court of equity as provided in Sections 5 and 6, Title II, of the Act, but they could not have the findings of the Commissioner reviewed by proceeding against the Director without making the Commissioner a party defendant. The Commissioner was a necessary party because it was his action which it was sought to control. Under the statute and regulations he requires applications for permits and the necessary bonds to be filed. These he reviews as well as the Director's recommendations thereon, and finally he grants the permits. In any suit affecting his duties,

judgment, or discretion in these matters he necessarily must be made a party defendant. He was an indispensable party because without him the court could not proceed to a complete and final decree. An injunction issued solely against the Director could readily be avoided by the Commissioner appointing a new Director. A decree, therefore, running against the Director alone is not a complete and final decree. *Shields* v. *Barrow*, 17 How. 129; *United States* v. *Bean*, 253 Fed. 1.

The court below, therefore, did not err in affirming the decree because the Commissioner of Internal Revenue was not made a party to the suit.

II.

Power of the Federal Prohibition Commissioner to fix the limits of a permit.

Permits are issued under the National Prohibition Act and the regulations made pursuant thereto by the Federal Prohibition Commissioner as the agent or subordinate of the Commissioner of Internal Revenue. Title II, Sec. 1, Subdivision 7; Secs. 38, 6. Section 6 provides that "No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the Commissioner [of Internal Revenue] so to do," with exceptions not material here. It also is stated "permits to purchase liquor shall *specify* the *quantity* and kind to be purchased and the purpose for which it is to be used." Further, "Every permit shall be in writing, dated when issued, and signed by the Commis-

sioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall *designate* and *limit* the acts that are permitted and the time when and place where such acts may be performed." Also, "The Commissioner may prescribe the form of all permits and applications and the facts to be set forth therein." And also, "Before any permit is granted, the Commissioner may require a bond in *such form and amount as he may prescribe* to insure compliance with the terms of the permit and the provisions of this Title." (Italics ours.)

The Act in Subdivision 7, Section 1, Title II, also provides, "The term 'regulation' shall mean any regulation prescribed by the Commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the Commissioner is authorized to make such regulations."

Acting under this power, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, on January 16, 1920, issued regulations known as "Regulations 60." Article III of these regulations provides for the application for and issuance of the above-mentioned permits and specifies in detail the amounts and the procedure to be adopted. It is there provided that an application for a permit according to Form 1404 should be made setting forth the data required by the regulations, which applications are to be sent to the Director, and except for applications for permits to transport or prescribe, the Director is to forward the applications

to the Commissioner. It is then provided (Section 9) that "after examining the application and data forwarded therewith the Commissioner, after noting his approval or disapproval on each copy of the application, will return one copy to the Director and forward one copy to the applicant. If the application or *any part thereof* is approved by the Commissioner, it will be given a proper serial number and the Commissioner will issue a permit in triplicate on the appropriate Form 1405 *for the act or acts approved*, noting such serial number on each copy thereof. One copy of the permit will be forwarded to the Director and one copy to the applicant. The original copy of the application and one copy of the permit will be filed by the Commissioner." (Italics ours.) It also is provided that before forwarding the application on Form 1404, the Director will examine carefully the qualifications of the applicant and note his approval or disapproval on each copy and forward all three copies to the Commissioner, setting forth any special circumstances that may exist. But it is the Commissioner who decides upon issuing the permit and finally issues the same.

It is further stated (Section 15) that "Every permit will clearly and specifically *designate* and *limit* the acts that are permitted and the time when and the place where such acts may be permitted."

The permit in question conformed to these provisions. It was issued on the blank known as Form 1405, authorizing appellants to sell and use intoxicating liquor under certain conditions, and in which permit the Commissioner did "specify the quantity

and kind to be purchased and the purpose for which it is to be used," to wit, certain nonbeverage purposes. The permit also *designated* and *limited* the acts that were permitted thereunder and the time and place when and where they were to be performed, to wit, the applicants were limited to 100 gallons of distilled spirits and 5 gallons of wine per quarterly period, the permit to be effective until December 31, 1921, unless revoked, and to be used at No. 27 Stockton Street, San Francisco. (R. 14.)

The same regulations provide (Section 20 et seq.) for bonds. The amount of the penalty of the bond, in order to permit its preparation in advance, is in practice based upon the amount stated in the application. In case the application is not granted for the full amount, since the greater includes the less, the tendered bond may be allowed to stand, although in strictness the penalty of the bond need be no more than an amount fixed with reference to the liquors "manufactured or received" during a quarterly period, not less, however, than $1,000 nor more than $100,000 (Subdivision (a), Section 20). The amount of the bond, therefore, is not significant of the amount for which the permit should issue.

It thus appears that both by the National Prohibition Act and by the regulations issued thereunder the Commissioner has the discretion to limit the liquor that may be purchased or used to such amount as he deems proper. A contrary construction which would require the Commissioner to issue a permit for whatever amount of liquor an applicant might

request, or for whatever amount he might be willing to tender a bond, would give rise to grave abuse. Indeed, it would greatly impair the efficiency of the law. So, from the necessity of the case, as well as from the express provisions of the Act and the regulations, the Commissioner is authorized, required, and commanded to state in the permit when it is issued the amount or *limit* of liquors that may be procured thereunder.

The discretion to determine the amount or limit of a permit must be placed somewhere. Obviously it can not be left with the applicant, as appellants contend, to depend on the mere statement of his business needs or the amount of bond he is willing to tender. Congress placed it with the Commissioner. To accomplish this a more specific or mandatory direction than is contained in the foregoing provisions of the Act was not necessary. Authority was conferred on the Commissioner to prescribe regulations for carrying out the provisions of the Act. The regulations so prescribed authorize the Commissioner, as above indicated, to approve all or any part of an application and to designate and limit the acts to be performed under a permit. Of such a situation, this court, in *United States* v. *Birdsall*, 233 U. S. 223, 235, said:

> It is not enough to say that there is no mandatory requirement imposing the obligation to give the recommendation. In executing the powers of the * * * office there is necessarily a wide range for administrative discretion and in determining the scope of official action regard must be had to the authority conferred; and this, as

> we have seen, embraces every action which may properly constitute an aid in the enforcement of the law.

The Commissioner having authority to exercise his discretion in the performance of his duties, the case is one where primarily a court of equity would not have power to restrain his acts or to coerce him in the performance thereof by mandatory injunction or otherwise. It would not control him in the exercise of his judgment or discretion. His acts would not be purely ministerial. This conclusion is plainly stated in one of the cases cited by appellants, to wit, *Noble* v. *Union River L. R. Co.*, 147 U. S. 165. There the general rule is declared and the decisions reviewed show a distinction between a case involving the exercise of judgment and that of performing acts purely ministerial, and the principle here contended for is expressly conceded. Accordingly, *in the absence of special provision*, a court of equity would have no authority to control the discretion of the Commissioner in issuing permits on Form 1405 or in limiting the acts to be performed thereunder.

III.

An adequate remedy is provided by the statute for any improper exercise of Commissioner's discretion.

The statute expressly provides a remedy for the possible unlawful exercise of power by the Commissioner in refusing to grant a permit. Section 6, Title II, declares:

> In the event of the refusal by the Commissioner of any application for a permit, the

> applicant may have a review of his decision before a court of equity in the manner provided for in Section 5 hereof.

Similar provision is made respecting the revocation of a permit. Section 5 referred to provides:

> The manufacturer may by appropriate proceeding in a court of equity have the *action* of the *commissioner* reviewed, and the court may affirm, *modify*, or reverse the finding of the commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such article. [Italics ours.]

It is submitted that this remedy is in all respects adequate to afford full relief to the applicant as against any unlawful act of the Commissioner in refusing to issue the permit as applied for, that is, in improperly limiting the acts to be performed or in inserting unjust conditions in the permit. In a suit to review the action of the Commissioner in revoking a permit, it is provided that during the pendency of the action the permit shall be temporarily revoked. No corresponding provision, however, obtains with respect to a suit to review the act of the Commissioner in refusing a permit; this for the evident reason that a court could not issue a temporary permit during the trial, that power residing solely in the Commissioner.

Accordingly, we submit that the case is governed by the well-established rule that where the action of an officer is a matter of discretion, either as to the

manner of its exercise or as to the extent to which it will be exercised, a court of equity will not control such discretion by a mandatory or other injunction or by a writ of mandamus. This general rule governs the instant case to the full extent of the principle, except that effect must be given to the above-specified saving clauses, whereby any applicant who conceives himself injured by the particular action of the Commissioner may begin his suit in equity to review such action. It will be noted that in such a suit the court not only may affirm or reverse the Commissioner's findings, but may *modify them*. This latter element of the power of the court would indicate that it was contemplated that the remedy provided should be sought in the contingency we have here, namely, where the application is granted in part. And, as we have seen, the Commissioner has power to grant it in part. If the remedy were limited to the case of a total refusal of a permit, there would be nothing for the court to do but to *reverse* the action, if the facts called for such decision. There would be nothing to modify.

It is submitted appellants should have commenced their suit in equity against the Commissioner to review the action complained of. Failing this, his action is a finality and binds all subordinates, officials, and agents acting under him, and any suit against them to control his action must fail.

IV.

Congress has power, under the Eighteenth Amendment, to restrict the use of spirituous liquors for nonbeverage purposes.

Appellants contend the Eighteenth Amendment does not authorize Congress to limit, restrict, or prohibit the use of spirituous liquors for purposes other than beverage purposes, inasmuch as said Amendment is a grant of power and Congress has no right to enlarge the grant by legislation; that the regulation of the practice of medicine and of pharmacy is a matter within the domain of the powers reserved to the States, no part of which has been granted to the Federal Government by the Eighteenth Amendment.

The Eighteenth Amendment, however, prohibited the traffic in intoxicating liquors for beverage purposes and gave Congress power to enforce this prohibition by appropriate legislation. "Appropriate legislation" means such legislation as will tend to make this constitutional provision completely effective; that is, legislation which will give full force and effect to the constitutional inhibition against the traffic in intoxicating liquor. The duty of enforcing this prohibition carries with it full power to do all things necessary for its accomplishment. *Ex Parte Virginia*, 100 U. S. 339. Accordingly, Congress enacted the National Prohibition Act, entitled "An Act to prohibit intoxicating beverages, and to *regulate* the manufacture, production, use, and sale of high-proof spirits for other

than beverage purposes," etc., which Act provides, among other things, that all its provisions shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented (Sec. 3, Title II); authorizes the Commissioner of Internal Revenue to establish regulations for its effective enforcement, and contains numerous other stringent provisions to prevent its evasion.

Congress has been given express power to enact legislation to prohibit the use of intoxicating liquor for beverage purposes, and this power carries with it the incidental power to enact such laws and provide for such regulations as will effectively prevent the traffic in intoxicating liquor for the prohibited purposes.

> *McCulloch* v. *Maryland*, 4 Wheat. 315;
> *Purity Extract Co.* v. *Lynch*, 226 U. S. 192;
> *Hoke* v. *United States*, 227 U. S. 308;
> *Ruppert* v. *Caffey*, 251 U. S. 264.

Appellants concede that in order to prevent the use for beverage purposes Congress may provide for reasonable regulations respecting the use of intoxicating liquor for medicinal and sacramental purposes, but contend that the use for the latter purposes may not be restricted or prohibited. Every form of regulation implies a partial prohibition. Regulation means the prohibition of something and the extent of the prohibition is a matter for the determination of Congress, provided only that it stays within the limits of constitutional power. In determining whether legislation may under some circumstances properly take the

form or have the effect of prohibition, the nature of the evil sought to be suppressed must be taken into consideration. *Lottery Case*, 188 U. S. 321, 355, 359. The exceptional nature of the subject treated was the justification for the action of Congress. *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U. S. 311, 332. It was competent for Congress to recognize the difficulties always besetting the administration of laws aimed at the prevention of traffic in intoxicants. It is well known that the unrestrained traffic in liquor for alleged medicinal purposes results in great abuses and serves as a ready means of defeating the constitutional prohibition.

Congress was not restricted to mere regulation if the end sought could not be accomplished except by partial prohibition. To prevent the beverage use many States found it necessary to prohibit the medicinal use. The Eighteenth Amendment was designed to prevent the same evil and, it is submitted, vested Congress with the same legislative discretion. If Congress can not effectively enforce the provisions of the Amendment except by the exercise of a police power similar to that exercised by the States, it is well settled that it may exert such power. *Hamilton* v. *Kentucky Distilleries Company*, 251 U. S. 146. The power of a State in the enforcement of its prohibition laws to prohibit the manufacture and sale of liquors for medicinal purposes has been sustained by the highest courts of the States and by this court.

The Government need not, however, argue this point *in extenso* in this brief, for two substantial reasons:

1. The reasons suggested under Points I, II, and III would seem to be conclusive.

2. The question of power, under the Eighteenth Amendment, has already been discussed by the Government in its briefs filed in the case of *James Everard's Breweries* v. *Day, Prohibition Director, and others* (No. 200 of this Term).

If further argument be necessary on our Point IV, we venture, in view of the fact that the *Everard case* will be argued shortly before the instant case, to remind the Court of both the printed briefs and oral argument in that case.

The Eighteenth Amendment clearly indicates that the scope of the prohibition and the details of its enforcement were to be left to Congress. In a sense, the Eighteenth Amendment does not act *in personam*. It does not say that a man may not drink intoxicating liquors. In a sense, it does not act even *in rem*; for it does not act *directly* upon the contraband merchandise. Its inhibition is directed to the processes of manufacture and transportation of the outlawed merchandise. Undoubtedly its purpose was to stop the habit of drinking intoxicating liquors in the United States, and it sought to accomplish this by cutting off the base of supplies. What was forbidden was the manufacture and transportation of intoxicating liquors for beverage purposes; but not only was the method of enforcement left to Congress, but

even the definition of "intoxicating liquors" and of "beverage purposes" was not provided by the Constitution itself. The details of definition and enforcement were left primarily to Congress, under the second clause, and, ultimately, to the judiciary, for fair interpretation.

The Amendment as proposed to the States was not a new expedient. Before Congress took this action, the subject had been discussed for several generations and had resulted, in the States, in many Constitutional provisions and statutory laws. Upon these was built a very considerable body of judicial construction.

Prior to the submission to the States of the Eighteenth Amendment, there were already in the Constitutions of at least seventeen States a prohibition of intoxicating liquors. Some of these, simply prohibited intoxicating liquors, without any exception in favor of such permitted use for medicinal purposes. The Constitutions of other States, as, for example, Kansas, contained an express exception in favor of the manufacture and sale of intoxicating liquors for medical, scientific, and mechanical purposes.

In nearly all the instances, with few exceptions, the Legislatures of the various States, in enforcing the Constitutional prohibition, were given a wide discretion to determine under what conditions and for what purposes the use of intoxicating liquors should be permitted. Thus, in twelve States (Arizona, Utah, Maine, New Mexico, North Dakota, Georgia, Kansas, Nebraska, North Carolina, Idaho, Washington, and

West Virginia), no intoxicating liquors of any kind might be prescribed under the enforcing legislation; while in eleven States (Alabama, Arkansas, Delaware, Florida, Indiana, Mississippi, Oklahoma, Oregon, South Carolina, Tennessee, and Texas) pure alcohol only could be prescribed.

While some of this legislation was subsequent to the Federal Prohibition Amendment, yet most of it antedated it. These Constitutional provisions and statutory laws had given rise to a great many decisions, some of which had reached this Court under the Fourteenth Amendment, and it had been uniformly held, both by the highest Courts of the States and this Court, that the power to regulate intoxicating liquors not only carried with it the power to proscribe intoxicating liquors, but, when necessary, liquors which were similar in appearance to intoxicating liquors, but, in fact, not intoxicating at all.

Purity Extract Co. v. *Lynch*, 226 U. S. 192.
Ruppert v. *Caffey*, 251 U. S. 264.

In the latter case, the Court will find, in the elaborate footnotes to the exhaustive opinion of Mr. Justice Brandeis, references to many of these Constitutional provisions and statutory laws.

All this body of Constitutional and statutory law and judicial decisions thereon was unquestionably before Congress when it drafted the Eighteenth Amendment. It was not building the foundations of a new public policy; it was only erecting a superstructure thereon.

Inasmuch as concurrent power of both State and Nation was clearly contemplated, it is a fair assumption that the Eighteenth Amendment was intended to harmonize with the general policy of the States, which experience had proved to be effectual in suppressing the liquor traffic. Moreover, the form and structure of the Eighteenth Amendment were to be in harmony with the Constitution in stating general principles, but leaving the details to legislative discretion. For example, the Amendment does not suggest any definition of intoxicating liquors, and even experts might disagree as to what is, in a given case, an intoxicating liquor. Therefore, the second clause empowered Congress in enforcing the general policy of prohibition to determine what was an intoxicating liquor.

Possibly the late Chief Justice White had this theory in mind when, in his concurring opinion in the *National Prohibition Cases* (253 U. S. 350, 390), he said:

> In the first place it is indisputable, as I have stated, that the first section imposes a *general* prohibition which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not define the intoxicating beverages which it prohibited, in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the prohibited beverages, but also of enacting such

> regulations and sanctions as were essential to make it operative when defined. In the third place, when the second section is considered with these truths in mind, it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the Amendment to the dual system of government existing under the Constitution. [Italics mine.]

This does not mean that Congress has any unlimited discretion in the matter. It can not create, by statutory law, an exception which would defeat the "general" policy of prohibition; but, in harmony with the legislation of the States, with which the Amendment proposed to work in cooperation to suppress a great evil, Congress, to whom the duty was committed of providing enforcing statutes, was empowered to say *within reasonable limits*, under what circumstances and for what special purposes intoxicating liquors could be manufactured or transported, even in a beverage form for purposes which had not generally been regarded as within the evil which the Amendment sought to destroy.

If this view be sound, then the power of Congress to determine amounts of intoxicating liquors a druggist could be permitted to have, and its power to vest in the Treasury Department, and especially in the Commissioner of Internal Revenue, the determination of the question of the quantity of liquor that any pharmacist or physician might have or prescribe for a special purpose permitted by the law is clear.

Even if this interpretation of the Eighteenth Amendment is not correct, the fact remains that, even though the Eighteenth Amendment may not forbid the use of intoxicating liquors for medicinal purposes, yet, if Congress reaches the conclusion that, in enforcing the policy of prohibition, it is necessary to forbid otherwise legitimate uses of "nonbeverage liquors," its power is equally beyond dispute. (See *Purity Extract Co.* v. *Lynch*, 226 U. S. 192.) If, as in the case last cited, a State, in enforcing its laws against intoxicating liquors, may forbid the use of a liquor which is, in fact, not intoxicating, then, *a fortiori*, it can forbid an otherwise legitimate use of intoxicating liquors, if such inhibition is necessary to prevent the traffic in such liquors for so-called "beverage" purposes.

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APPENDIX.

STATUTE.

Section 1, Title II, of the National Prohibition Act (Chap. 85, 41 Stat. 305), defines the meaning of the words "person," "commissioner," "application," "permit," and "bond," as used therein. The word "commissioner" shall mean Commissioner of Internal Revenue. The term "permit" is defined to mean a formal written authorization by the Commissioner *setting forth specifically* therein the things that are authorized. Subsection 7 of this section declares:

> The term "regulation" shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations.
>
> Any act authorized to be done by the commissioner may be performed by any assistant or agent designated by him for that purpose. Records required to be filed with the commissioner may be filed with an assistant commissioner or other person designated by the commissioner to receive such records.

Section 4 enumerates various articles therein declared not subject to the provisions of the Act if they correspond with certain specified descriptions and limitations, in which event the Commissioner is authorized to issue a permit for their sale. By Section 5, however, it is provided that whenever the Commissioner has reason to believe that any of such articles do not correspond with the descriptions and limitations specified in Section 4, he shall make an investigation upon prescribed notice, and in the

event that the manufacturer of such an article fails to show to his satisfaction that the article corresponds to the descriptions and limitations provided in Section 4, his permit shall be revoked.

Section 5 concludes with the provision that—

> The manufacturer may by appropriate proceeding in a court of equity have the *action* of the *commissioner* reviewed, and the court may affirm, *modify*, or reverse the finding of the commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such article.

By Section 6 it is declared, among other things, that no one shall manufacture, sell, purchase, transport, or prescribe any liquor *without first obtaining a permit from the Commissioner* so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as therein provided. The life of such permits is prescribed, and it is declared that they shall *specify* the *quantity* and kind of liquor to be purchased, and the purpose for which it is to be used, power being given the Commissioner to prescribe the form of all such permits and of the applications therefor, and to require bond in such form and amount as he may prescribe, and further, as follows:

> No permit shall be issued to any one to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State to compound and dispense medicine prescribed by a duly licensed physician. * * * Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and

address of the person to whom it is issued and shall *designate and limit the acts that are permitted* and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

And Section 6 contains this further provision:

In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in Section 5 hereof.

Section 38 authorizes the Commissioner of Internal Revenue and the Attorney General to appoint and employ such assistants, experts, clerks and other employees, including such executive officers as they may deem necessary for the enforcement of the provisions of the Act.

[Italics ours.]

REGULATIONS.

Regulations 60 of the Bureau of Internal Revenue, relative to the manufacture, sale, etc., of intoxicating liquor, declare, Section 1, Article I, that the word "Commissioner" when used in the regulations shall mean the Federal Prohibition Commissioner, and the word "Director" or the phrase "Federal Prohibition Director" shall mean the person having charge of the administration of Federal prohibition in any State.

Section 2, Article II, declares:

On and after January 17, 1920, the kinds of intoxicating liquors enumerated below may be manufactured, sold, bartered, transported, imported, exported, delivered, furnished, pur-

> chased, possessed, and used for nonbeverage purposes as indicated below, but only under the conditions and requirements hereinafter provided.

And then follows a list of intoxicating liquors and the purposes for which they may be used by pharmacists and others.

Section 4 provides:

> On and after January 17, 1920, intoxicating liquor may not be manufactured, sold, bartered, transported, imported, exported, delivered, furnished, purchased, possessed, or used for any other purposes or by any other persons than specifically authorized herein, except for such nonbeverage purposes for which the commissioner may in his discretion issue permits.

Section 6, Article III, declares that all persons, with exceptions not material here, "desiring to manufacture, sell, barter, transport, import, export, deliver, furnish, prescribe, purchase, possess or use intoxicating liquor for the nonbeverage purposes herein authorized must procure permits therefor in the manner hereinafter prescribed."

Section 8 is as follows:

> Persons desiring to procure any permit required by these regulations, other than permits to purchase, must submit application for permit, form 1404, in triplicate, clearly setting forth all the data required by the regulations dealing with the particular class or classes into which they fall. Form 1404, supplemental, must be attached in case of application for permit to use intoxicating liquor in the manufacture of certain preparations as provided in Article XI. All three copies must be signed by the applicant, the

original being sworn to before a person authorized to administer oaths. All three copies must then be forwarded to the Director of the State in which the place of business of the applicant is located.

(*a*) After application is filed for permit to transport or prescribe intoxicating liquor, the Director is authorized to issue permit to the applicant, if, after examination of the qualifications of such applicant, he believes that such permit should be granted. Such permits will be issued in triplicate on appropriate form 1405, and a serial number noted on each copy of the permit and application. The Director will also note on each copy of the application his approval thereof. The original copy of the application and one copy of the permit will then be forwarded to the Commissioner, and one copy of each will be forwarded to the applicant, the remaining copy of each to be retained in the files of the Director.

(*b*) In any case where the Director is in doubt concerning the propriety of issuing a permit to transport or prescribe he will forward the original copy of the application to the Commissioner with a statement of the facts, and the Commissioner will return said original application with instructions as to the proper action to be taken.

(*c*) In all cases where the application for permit is denied a copy of such application will be returned to the applicant with the Director's disapproval noted thereon. The original copy will be forwarded to the Commissioner with a statement of the Director's reason for disapproval, except in cases where such statement already is on file with the Commissioner. The other copy, with proper notation thereon, should be retained in the Director's files.

Section 9 provides:

> Where application is filed for any other permit required by these regulations, the Director, after carefully examining the qualifications of the applicant, will note his approval or disapproval in the appropriate space on each copy of the application and will forward all three copies to the Commissioner, and if any special circumstances exist will attach to the application and transmit to the Commissioner therewith a letter fully setting forth such circumstances. After examining the application and data forwarded therewith the Commissioner, after noting his approval or disapproval on each copy of the application, will return one copy to the Director and forward one copy to the applicant. If the application or *any part thereof* is approved by the Commissioner, it will be given a proper serial number and the Commissioner will issue a permit in triplicate on the appropriate Form 1405 for the act or acts approved, noting such serial number on each copy thereof. One copy of the permit will be forwarded to the Director and one copy to the applicant. The original copy of the application and one copy of the permit will be filed by the Commissioner.

Section 15 provides:

> Every permit will clearly and *specifically designate and limit the acts that are permitted* and the time when and the place where such acts may be permitted. * * * Any such permit may be revoked in whole or in part by the commissioner at any time, if it appears after proper hearing that the terms thereof have not been complied with. In the event of refusal by the commissioner to grant or renew a permit, or if any permit is revoked,

> the applicant or permittee may have the action of the commissioner reviewed by appropriate proceedings in a court of equity.

Section 20 declares that all persons desiring to obtain permits provided by the regulations, with exceptions not applicable here, must at or before the time of filing application therefor file with the Director a bond of a designated penal sum in duplicate on Form 1408 or Form 1409 to insure compliance with the provisions of the Act and the regulations, as well as to cover any taxes and penalties which may be imposed under the internal-revenue laws.

Section 22 provides:

> Whenever the quantity of intoxicating liquor or other preparations debited against the bond is such that the existing penal sum is not sufficient a new bond must be furnished in sufficient sum to cover all liability.

Section 54, Article VIII, relating to the procedure for procurement and delivery of intoxicating liquor by persons holding permits, declares that any person entitled to procure such liquor under the regulations must secure a permit to purchase on Form 1410 from the Director, and Section 55 prescribes:

> The applicant must describe the intoxicating liquor to be received by him with as much particularity as possible. He must give in all cases the quantity in wine gallons of each kind of intoxicating liquor on hand on the date of application, and previously received by him during the current calendar year. Each application must also show the name and address of the vendor, the purpose for which such intoxicating liquor is to be used, the number of the permit held by the applicant, and the address covered thereby.

(a) The applicant must assure himself that the quantity of intoxicating liquor outstanding as a debit against his bond, together with the additional quantity applied for, is not in the aggregate greater than the quantity covered by the penal sum of the bond.

Section 55 (h) provides:

Directors will keep a file of copies of permits to purchase, Form 1410, that have been returned by vendors. These forms must be filed chronologically and all forms issued to any one permit holder must be kept separate. This file should be kept up to date at all times. No application for permits to purchase should be approved by the Director until same has been carefully checked by him with such files, and the amounts thereon found to correspond with those indicated on the previous permit to purchase issued to the applicant.

[Italics ours.]

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